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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 481

VIKING THEATRE CORPORATION, *Petitioner,*

against

PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS TWENTIETH CENTURY-FOX FILM CORPORATION AND FOX PHILADELPHIA BUILDING, INC.

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February 28, 1964

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Opinions Below

The opinion of the Court of Appeals for the Third Circuit is reported in 320 F. (2d) 285 and is printed in Volume X of the Record at pages 2766-92. All references here to that opinion are to the appropriate page or pages in the Record. The memorandum decision of District Judge John W. Lord, Jr., in which he directed a verdict for the defendants is not reported but is set out in the Record at pages 2349-52.

Jurisdiction

The judgment sought to be reversed was entered in the court below on June 21, 1963. The jurisdiction of this Court was invoked under Section 1254(1) of Title 28, United States Code.

The Question Presented

Petitioner (hereafter "Viking") seeks a reversal by this Court of a decision by the court below affirming a judgment on a directed verdict by the trial court in favor of the respondents here. In this ordinary anti-trust action among private parties Viking has posed six questions for determination by this Court. The first four relate to so-called "splits" of motion pictures between two exhibitors in Philadelphia, Stanley Warner Management Corporation (hereafter "Stanley Warner") and William Goldman Theatres, Inc. (hereafter "Goldman"), which were in effect in one form or another for the pictures of the distributor respondents except Twentieth Century-Fox Film Corporation (hereafter "Twentieth Century-Fox), a distributor of motion pictures which had for many years licensed its pictures, in the main, to the Fox theatre, operated by the respondent Fox Philadelphia Building, Inc. (hereafter "Fox Philadelphia").

Viking seeks to connect Twentieth Century-Fox and Fox Philadelphia with those splits although there was not a suggestion by any witness at the trial that either was a party to or had any connection with any such split. The evidence is indisputable as to the fact of the splits but there was no evidence from which an inference can be drawn that either Fox Philadelphia or Twentieth Century-Fox was a party to a split. For that reason consideration of the first four questions is left to the respondents concerned with the splits.

The two remaining questions raise no unique or undecided questions in the anti-trust field. They relate merely to rulings on evidence by the trial court. In affirming and in deciding all questions before it in favor of the respondents, the Court of Appeals below recognized and gave full effect to this Court's decision in *Continental Ore Co.* v. *Union Carbide*, 370 U. S. 690. The court below noted that, in view of the directed verdict by the trial court,

> "The determination of the legal issue raised by this argument requires consideration of the evidence in its entirety, and as it relates to each of the defendants. The evidence, including the inferences of which it is reasonably susceptible, must be viewed in the light most favorable to the plaintiff" (R. 2768).

The court then said that

> "The question is whether the evidence thus viewed was legally sufficient to warrant submission of the case to the jury" (R. 2768).

We agree. So far as the respondents Twentieth Century-Fox and Fox Philadelphia are concerned—well, indeed, for that matter, so far as all the respondents are concerned—the question posed by the Court of Appeals below is the only question that could be before this Court. The Court of Appeals answered that question in the negative after a year of exhaustive consideration of the record.

The Statutes Involved

The pertinent statutes are Section 1 of the Sherman Act, 26 Stat. 209, 15 United States Code, § 1, and Section 4 of the Clayton Act, 36 Stat. 731, 15 United States Code, § 15.

Statement of the Case

Viking's statement of the case covers twenty-three pages of its brief (Br. pp. 4-27). Only one of those pages relates specifically to Twentieth Century-Fox and Fox Philadelphia. There are also a few other scattered references to them. The first forty-four of Viking's fifty-two page brief, moreover, are devoted to the splits of motion pictures in Philadelphia. Viking has attempted to connect Twentieth Century-Fox and Fox Philadelphia with those splits by drawing inferences and

conclusions from fragments of testimony which do not support such inferences and conclusions. That matter is considered below in the first part of our argument. Here we state the case as it was tried so far as the trial was concerned with Fox Philadelphia and Twentieth Century-Fox.

Viking is the operator of the Viking theatre at Nineteenth and Chestnut Streets in Philadelphia. Viking throughout was licensed and exhibited first-run motion pictures distributed by five of the distributor respondents in this case (Exh. P. 176, R. 2644-48). Over one-fourth, that is, eight of the thirty pictures exhibited by Viking were Twentieth Century-Fox pictures. There was never a day when Viking was dark, that is, closed, or when it exhibited pictures after another theatre. This is not a case of boycott or of refusal to deal. It is simply a resort to the courts to rescue an improvident investment in what, at best, could be described as a precarious—if not a failing—industry in a city which had too many first run theatres (R. 93-95).

Fox Philadelphia operated the Fox theatre, located at Sixteenth and Market Streets in Central City Philadelphia. The Fox has 2,422 seats (R. 2792). Jay Wren, Viking's manager, testified that the Fox is a fine first-run theatre (R. 841). Asked if the Fox were well located, Wren said, "I am surprised you gave it up" (R. 841).* Wren readily conceded that the volume of human traffic, that is, people, on Market between Sixteenth and Seventeenth was greater than that on Chestnut between Eighteenth and Nineteenth, Viking's location (R. 842). Ted Minsky, a film buyer for Stanley Warner, affirmed that testimony. Minsky also testified that the Stanton and Fox theatres, situated in the same block between Sixteenth and

*This is the fact. Judge Lord ruled that no mention could be made in opening or in questioning of the fact that Fox Philadelphia was forced to give up operation of the Fox theatre. Mr. Wren volunteered this answer. Obviously, there were too many first run theatres in Philadelphia.

Seventeenth on Market, were the best located theatres in Philadelphia (R. 1626). With respect to seating capacity, as between the 2,422-seat Fox and the 1,017-seat Viking, Wren also conceded that, while he could put tickets in the hands of 2,400-plus people, he could seat only 1,017 of them in the Viking at one time (R. 843). The Fox was manifestly superior to Viking in every way.

Fox was the only theatre operated by Fox Philadelphia although Fox Philadelphia was, to be sure, a wholly-owned subsidiary of National Theatres, Inc., a company which owned other theatres.* The Fox was the only theatre operated by Fox Philadelphia.

The respondent Twentieth Century-Fox is a producer and distributor of quality motion pictures. It had no affiliation with any other distributor or producer of motion pictures and owned no theatres in Philadelphia or elsewhere in the United States. For many years Twentieth Century-Fox pictures had been exhibited in the Fox theatre (R. 2322). This was the not uncommon practice, regardless of the product, of a supplier having a favorite outlet for its product. During the period of this law suit Twentieth Century-Fox licensed fifty-seven pictures for first run exhibition in Philadelphia. Of that number, Viking bid or negotiated, that is, had an interest in, fifteen (R. 838).** Viking was licensed and played eight of those fifteen Twentieth Century-Fox pictures (R. 838).

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*We concede this to be a fact. There was no suggestion, however, not even a whisper, that the Fox was operated as anything other than as a single theatre in Philadelphia.

**Viking concedes that it was interested in only 87 pictures. It sought those pictures by making a bid or offer. The meaning of that term is spelled out in Wren's testimony (R. 649):

> "Mr. Sawyer: You say 'had an interest in,' you mean for which he bid?
> "By Mr. Nizer: Q. Or which you made an offer, showed an interest. On which you made some offer?
> "A. That's right."

Viking's owner and president, Harry Sley, had no business dealings whatever—none—with Twentieth Century-Fox and did not once mention either Fox Philadelphia or Twentieth Century-Fox at any point in his entire testimony. Jay Wren became associated with Viking in January, 1955, and became manager of the theatre in March, 1955. He conceded that Viking was never denied an opportunity by Twentieth Century-Fox to bid or negotiate, one or the other, for Twentieth Century-Fox pictures (R. 838-39). Viking was entitled to that but no more than that. Twentieth Century-Fox also granted Viking open bidding. This meant that sealed bids or offers were brought to the Twentieth Century-Fox office in Philadelphia by the interested exhibitors and were then opened for the first time in the presence of those who had bid (R. 195-96, 264, 839). Viking thus knew what Fox Philadelphia had bid and, to be sure, Fox Philadelphia knew what Viking had bid (R. 839).* Fox Philadelphia and Twentieth Century-Fox were not carrying on a clandestine affair between themselves or with others. No secrecy attached to the business dealings of Twentieth Century-Fox with Philadelphia exhibitors, including Viking, Fox Philadelphia and all other exhibitors. An open method of doing business such as this dispels any suggestion of conspiracy.

Viking claims (Br. p. 25) that it was licensed only one picture having a national film rental** of over $4 million as compared to four such pictures licensed to the Fox. That claim is of no significance here unless Viking had sought the pic-

*There was no evidence that Twentieth Century-Fox conducted the licensing of its pictures on competitive bidding in an unlawful or improper manner. Whatever comfort Viking may derive from the use of colorful epithets, none is applicable to Twentieth Century-Fox's method of licensing motion pictures. Not only is Jay Wren silent on this matter but he concedes that Twentieth Century-Fox granted Viking the open bidding, described above.

**National film rental is the total film rental received from all exhibitors in the country.

tures licensed to the Fox and had been unlawfully prevented from licensing them. The fact is that Viking made no efforts to license any Twentieth Century-Fox pictures, including one of the four, the $4 million-plus picture NO BUSINESS LIKE SHOW BUSINESS (R. 44), prior to Wren's association with Viking. Mr. Sley, who ran the theatre for the first year, had no business dealings with Twentieth Century-Fox. Wren had no interest in two of the three other Twentieth Century-Fox pictures which had national film rentals of over $4 million, namely, A MAN CALLED PETER and SEVEN YEAR ITCH (R. 713). Viking had no complaint on the fourth, THE KING AND I. So much for that claim. The converse of it, however, seems to be that Viking was the only theatre which played pictures which had low national film rentals. Viking did play ten pictures which had national film rentals of less than $1 million (Exh. P. 176, R. 2644-48). But Fox Philadelphia also played ten pictures which had national film rentals of less than $1 million (R. 835-37).

Viking bid for pictures and so did Fox Philadelphia. There was no evidence—none—that any picture was licensed to Fox Philadelphia except on written competitive bids. Indeed, Viking's purported offer of proof as to the number of pictures licensed on bids did not include Fox Philadelphia (R. 1039). The only permissible inference from that fact is that Fox Philadelphia licensed a larger number of pictures by bidding, which happens to be the fact, than Viking.*

If Viking paid too much for some pictures, as it now claims (Br. p. 24), it was not due to anything the defendants did but

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*When William Moclair became manager of the Fox theatre in November, 1955, he was informed that there was bidding in Philadelphia and that he would be required to bid for pictures. This he did (R. 2321). We always come back to the fact that not only was there bidding for Twentieth Century-Fox pictures but open bidding, the system whereby each competitor knew the other's bid. A conspiracy was impossible under such conditions.

was because its managers exercised poor business judgment, as now seems apparent, in electing to secure a picture such as MAN IN THE GREY FLANNEL SUIT which had a national film rental of $3,601,000 (R. 45, 586) instead of a picture such as THE EDDY DUCHIN STORY (R. 361-62) which had a national film rental of $4,694,000 (R. 56, 950). Concerning Wren's business judgment, Viking offered a guarantee of $106,500 on MAN IN THE GREY FLANNEL SUIT but only $27,500 on PICNIC which had a national film rental of $6,132,000 (R. 586). Regarding Viking's bid on MAN IN THE GREY FLANNEL SUIT, Wren testified (R. 361-62):

> "Q. * * * You bid for MAN IN THE GRAY FLANNEL SUIT on April 3, 1956. Will you accept that specific date?
> "A. If that is what you have there, yes.
> "Q. But you didn't have any interest in the EDDY DUCHIN STORY, which was a day before that for bidding, April 2, 1956, did you? That is one you ignored.
> "A. Because we thought that FLANNEL SUIT would be a better grosser.
> "Q. So you chose between two good pictures, didn't you, voluntarily?
> "A. Yes, sir.
> "Q. Nobody compelled you to bid on GRAY FLANNEL SUIT and nobody told you not to bid on the EDDY DUCHIN STORY, that is a matter of your judgment, right?
> "A. Yes, sir.
> "Q. And if you make a mistake in judgment you don't expect subsequently that either your competitors or the motion picture companies will give you back the money that you lost due to your bad exercise of judgment, do you? You don't claim that?
> "A. No, sir.
> "Q. And in the case of THE MAN IN THE GRAY FLANNEL SUIT you did exercise bad judgment as it

turned out, you bid too much for it, didn't you?
"A. Yes, sir."

This testimony by Viking's manager demonstrates the precarious nature of the motion picture exhibition business and the advantages of estimating correctly the box office value of a picture, any picture.

Twentieth Century-Fox and Fox Philadelphia received only slight, albeit honorable, mention by the court below in its opinion. The references to them in the court's opinion show the tenuous nature of Viking's case against them. Fox Philadelphia and Twentieth Century-Fox are first described by name in footnotes as defendants (R. 2766-67). The following verbatim quotations are the only specific references to them:

> "The evidence in this case shows that the product of TWENTIETH CENTURY was available to all exhibitors and was licensed on the basis of open competitive bidding. The plaintiff did not become interested in TWENTIETH CENTURY pictures until after March 1955, when Jay Wren became manager of the VIKING. The plaintiff submitted bids on fifteen pictures, and, of these, licensed and exhibited eight; the others were licensed to Fox. The average national film rental of the pictures licensed to VIKING was one million two hundred thousand dollars." (R. 2774)
>
> * * *
>
> "8. The pictures of TWENTIETH CENTURY were not split between STANLEY WARNER and GOLDMAN. They were customarily exhibited by Fox." [footnote, R. 2775]
>
> * * *
>
> "The product of TWENTIETH CENTURY was licensed picture by picture on a competitive bidding basis, except where no bids were submitted. Its product was not split between STANLEY WARNER and GOLDMAN, and was apparently made available to all interested exhi-

> bitors. There is no evidence that this defendant at any time rejected all bids and thereupon negotiated with any exhibitor. The record is devoid of evidence from which it can be inferred that TWENTIETH CENTURY was aware of the PARAMOUNT agreement, or, if aware of it, participated in the plan of distribution contemplated." (R. 2778-79)
>
> * * *
>
> "It was the policy of TWENTIETH CENTURY to deny adjustments on pictures licensed on a competitive bidding basis. This policy cannot be regarded as discriminatory." (R. 2784)

In the appendix to the court's opinion, the Fox theatre is described as being located on Sixteenth and Market Streets, as having 2,422 seats and as being owned by Fox Philadelphia (R. 2792).

The foregoing are all the references to these respondents in the opinion of the Court of Appeals, except a passing reference to thirteen pictures which Viking complained were licensed to Goldman or Stanley Warner after the rejection of all bids. The court noted that none was a Twentieth Century-Fox picture (R. 2778).

Viking called no one as a witness who was employed by Twentieth Century-Fox. It read into the record six pages of a deposition which it had taken of William Moclair, a former manager of the Fox theatre (R. 2320-26). The insubstantial nature of Viking's claim against Fox Philadelphia and Twentieth Century-Fox is apparent.

This brief is thus submitted on behalf of Fox Philadelphia and Twentieth Century-Fox because Viking has asserted virtually identical contentions against them. Indeed, Viking not only makes no distinction in its charges against Fox Philadelphia and Twentieth Century-Fox but lumps the two together. The issues before this Court are essentially the same for both. Also, in certain essential respects, Viking's claim and

contentions against the other respondents differ from those asserted against Fox Philadelphia and Twentieth Century-Fox.

Summary of Argument

There was no division of the market in Philadelphia. There was no evidence that Fox Philadelphia or Twentieth Century-Fox was a party to the splits of product of which Viking complains. Contrary to Viking's assertion to this Court, the evidence below was undisputed and is indisputable that neither was a party to a split. There was nothing secret about the splits. The evidence is that the only exhibitors which were parties to the splits were Stanley Warner and Goldman. The pictures of all the distributors except Twentieth Century-Fox were on the splits in one way or another. It could not be inferred that representatives of Stanley Warner and Goldman testified truthfully as to the existence of the splits between them but at the same time testified untruthfully with respect to Fox Philadelphia and Twentieth Century-Fox not being parties to the splits. The trial court could not permit an inference to be drawn that either Fox Philadelphia or Twentieth Century-Fox was a party to a split. There was nothing for the jury to decide on the issue of the splits, if that ever was an issue for the jury.

The trial court confined the trial to appropriate and proper bounds but it did not restrict Viking's evidence solely to the 87 pictures in which it claims that it was interested. Indeed, the court gave Viking unusual liberty. It permitted extensive evidence beyond the 87 pictures in which Viking claimed an interest. Viking, for example, offered to the court below a schedule showing the play-dates, box-office receipts and advertising expenditures on each and all of the forty Twentieth Century-Fox pictures exhibited at the Fox theatre (Exh. P. 135, R. 2751-54). There was extensive testimony as to twelve more, including the eight exhibited by Viking.

There was no important or significant fact with respect to Fox Philadelphia and Twentieth Century-Fox which was not before the courts below or available to them.

Twentieth Century-Fox had the right to prefer Fox Philadelphia as its customer over Viking. Twentieth Century-Fox nevertheless licensed Viking eight of the fifteen pictures in which it was interested.

Viking did not, despite repeated prodding by the court and counsel, prove the fact of damage and it offered no credible evidence concerning the amount of its damage. Aside from any other considerations, failure of proof on damages warranted a directed verdict by the District Court. There was no question on damages for the jury to determine.

ARGUMENT

I. NEITHER FOX PHILADELPHIA NOR TWENTIETH CENTURY-FOX WAS A PARTY TO THE SO-CALLED SPLITS OF PRODUCT IN PHILADELPHIA

Viking has posed six questions which it says this Court should decide in its favor and, in so deciding, reverse the judgment below. The principal questions relate to the splits of product between two of the respondent exhibitors which Viking asserts constituted a division of the market.* It claims that those splits constitute a *per se* violation of the Sherman Act. Viking further claims that the splits of product (that is, pictures) included not only Stanley Warner and Goldman and seven of the distributors but also Fox Philadelphia and Twentieth Century-Fox. That assertion is made to this Court despite explicit holdings by the court below "that the product of Twentieth Century

*There was in fact no division of the market. Viking's own brief establishes the existence of twelve competing first run theatres in Philadelphia (Br. p. 5). No theatre was excluded from competition. The Sherman Act requires no more than that there be no unreasonable restraint upon competition.

[Fox] was available to all exhibitors and was licensed on the basis of open competitive bidding" and that "the pictures of Twentieth Century [Fox] were not split between Stanley Warner and Goldman" (R. 2774, 2775).

Viking's assertion is also made despite the existence of a record which was made on Viking's own case that is completely to the contrary. Not only is the record uncontradicted that Fox Philadelphia and Twentieth Century-Fox were not parties to the splits, but there was a concession mid-way during the trial by Viking's trial counsel that he had not proven that Fox Philadelphia was a party to the splitting arrangement between Stanley Warner and Goldman.

A fair reading of Viking's statement of the case shows that it does not seriously regard either Fox Philadelphia or Twentieth Century-Fox as having been parties to any split. The entire force of its argument in the court below was directed at the two exhibitors who, by their own unequivocal and frank assertions, were parties to the splits, that is, Stanley Warner and Goldman. Viking refers in its brief here to only three fragments of testimony out of seven thousand pages of the transcript, excluding exhibits, as establishing its contention that Fox Philadelphia and Twentieth Century-Fox were parties to the splits (Br. p. 9-10). It could not be inferred from those fragments that there was an agreement between Stanley Warner and Goldman on the one hand and Fox Philadelphia on the other that Twentieth Century-Fox pictures would be licensed only to the Fox theatre. We do not, therefore, address ourselves here to any question concerning the legality of the splits but only to Viking's attempt to connect Fox Philadelphia and Twentieth Century-Fox with the splitting arrangements.

There were no secrets of any sort concerning the splits or the mechanics of splitting. Representatives of Stanley Warner and Goldman testified without equivocation with respect to both. Could it be supposed that the Stanley Warner

and Goldman representatives would have declared their own participation in the splits and lied about Fox Philadelphia or Twentieth Century-Fox being parties to a split? It is not conceivable that Mr. Fabian or Mr. Goldman would have sought to conceal the participation of Fox Philadelphia or Twentieth Century-Fox if either or both had been parties to the splits. The fact that neither was a party to any such split and that neither had any understanding or agreement with Stanley Warner or Goldman was established by uncontroverted evidence, by testimony from witnesses called by Viking who had no connection of any sort with Fox Philadelphia or Twentieth Century-Fox.

Simon Fabian was president of Stanley Warner (R. 64). He was Viking's first witness. The most Viking can make of Mr. Fabian's testimony is that he was satisfied with the splits (Br. p. 9). William Goldman, president of Goldman Theatres (R. 1629-30), likewise, was satisfied with the splits without Fox Philadelphia or Twentieth Century-Fox being a party to any such split (R. 1743). No unlawful conduct can be inferred from the fact that Twentieth Century-Fox preferred the best theatre in Philadelphia as its customer.

We consider first the testimony of Mr. Fabian. Concerning the splits and those who were parties thereto, Fabian testified (R. 115-16):

> "Q. Now, this split between you and Mr. Goldman was only between the two of you, was not that correct?
> A. That is correct.
> Q. Fox Theatre was not a party to the split, was it?
> A. No.
> Q. Did you have any understanding with Mr. Goldman whereby the Fox Theatre would play only Twentieth Century-Fox pictures?
> A. I had no such understanding with anybody to that effect, no."

Nat Fellman, who was originally in charge of the mechanics of the splits for Stanley Warner, followed Mr. Fabian to the stand and testified on direct (R. 126):

> "Q. I was at first; you answered that. Now I ask you a different question—did you, in fact, when you came down to make the split, include in the split the product of Twentieth Century-Fox?
> A. No, sir."

After Fabian and Fellman had testified, Jay Wren and Harry Sley of Viking testified from the seventh through the twenty-seventh day. Throughout all those days there was silence on this subject from Wren and Sley. Neither Wren nor Sley, either in his testimony or otherwise, intimated that he believed Fox Philadelphia or Twentieth Century-Fox was a party to any split in Philadelphia. On the twentieth day of the trial, moreover, Viking's trial counsel asserted in one argument, without a shred of evidence to support him, that there was an agreement that Twentieth Century-Fox pictures would go to the Fox theatre and Fox Philadelphia would not seek the pictures of other distributors. The following colloquy then occurred at pages 3342-43 of the stenographic minutes of the trial:*

> "Mr. Young: I have nothing to add to what Mr. Nizer said, Your Honor, I agree with it, except that Mr. Sawyer made a statement which is contrary to the record when he said that the Fox theatre was party to an agreement for the testimony by the witnesses which he called are not a part of such agreement. I did not want my silence to be assent.
>
> "Mr. Sawyer: I asserted that it was. That hasn't been proved out yet. We have more witnesses."

*The case was heard in the court below on a joint appendix. By inadvertance this colloquy was omitted from that appendix. It was submitted, however, to the Court of Appeals below in a supplemental appendix and has never been and could not be questioned by Viking.

Although Viking's able trial counsel asserted that he would prove participation in the splits by the Fox theatre, it was not proved by any of the witnesses called after that twentieth day of the trial. To the contrary, the later witnesses called by Viking, Ted Minsky of Stanley Warner, Goldman and Beattie of Goldman Theatres and Mansell, Weiner, Howard Minsky, Tunick and Madden, employees of distributors other than Twentieth Century-Fox, testified that there was no such agreement as that which Mr. Sawyer said he would prove. We consider first the testimony of Ted Minsky of Stanley Warner.

This Mr. Minsky succeeded Fellman as film buyer for Stanley Warner. He testified (R. 1619):

> "Q. I want to ask you one question before I go back to the blackboard. With respect to the Twentieth Century-Fox product, did you have any agreement with anybody respecting whether you would or would not bid for Twentieth Century-Fox pictures?
> A. I had no agreement with anybody."

and, further (R. 1626):

> "Q. Now, did you ever do anything, Mr. Minsky, as a representative of Stanley Warner, to prevent the Viking Theatre, Sley and Wren, from bidding or making any offers on Twentieth Century-Fox pictures that played the Fox Theatre or anywhere else?
> A. Never, Mr. Young."

So much for the Stanley Warner side of the splits. William Goldman, president of William Goldman Theatres, and originator of the splits (R. 1633-34), testified (R. 1743):

> "Q. Did you ever at any time seek to prevent the Viking Theatre from bidding or negotiating for any Twentieth Century-Fox picture that played at the Fox Theatre or anywhere else?
> A. No, sir.

Q. Did you have any agreement of any sort with Mr. Fabian or any other representative of Stanley-Warner whereby the Fox Theatre would play only Twentieth Century-Fox pictures?
A. No, sir.
Q. And of course, the Fox Theatre was not a party to this split we have talked about—
A. That is right."

George T. Beattie, vice-president of William Goldman Theatres, also testified that he had no agreement with any exhibitor to deprive Viking of any picture or to injure Viking (R. 1826) and that Twentieth Century-Fox pictures were not on any split (R. 1816).

Viking's first exhibit (Exh. P. 1, R. 2355-81) was a list kept by Stanley Warner of the pictures on each side of the splits. No Twentieth Century-Fox picture is listed on that exhibit (R. 1626).

The foregoing testimony by the two acknowledged parties to the splits affords no possible basis for an inference that Fox Philadelphia was also a party to any such split or that Twentieth Century-Fox pictures were on a split. There was, moreover, no understanding or agreement among any of the defendants as to how pictures would or would not be licensed to Viking, or which pictures would be licensed to Viking or the terms and conditions upon which pictures would be licensed to Viking. Howard G. Minsky of Paramount, for example, testified that he had no agreement with any one to deprive Viking of pictures (R. 1925-26). William D. Mansell of Warner Bros. Pictures testified to the same effect (R. 2060-61), as did Harry Weiner, Columbia's district manager, a portion of whose deposition was read (R. 2221).

Eugene Tunick of United Artists testified that his company had no agreement or understanding with any other distributor or any exhibitor to deprive Viking of first-run pictures (R.

2298-99). Tunick's testimony on that question was not attacked by Viking, as, indeed, it could not be. Viking was licensed eleven of the seventeen United Artists pictures in which it had expressed an interest.

William D. Madden of Metro-Goldwyn-Mayer also testified on deposition. He testified without contradiction that he had no agreement or understanding with any other distributor or any exhibitor to deprive Viking of an opportunity to compete for and obtain pictures on first run in Philadelphia (R. 2340). It is undisputed that Metro was Viking's favorite supplier during the first year of Viking's operation.

Viking called no representatives of RKO, Universal or Twentieth Century-Fox to testify. Witnesses from those companies, of course, were available either in person or by deposition. Under well-settled principles of law it must be presumed that the testimony of all such witnesses would have been unfavorable to plaintiff.

None of the foregoing testimony can be dismissed as mere disavowals by alleged co-conspirators. This testimony was by persons who were involved with the operation of the acknowledged splits between Stanley Warner and Goldman. These were the parties who would know and who did know about the split. No purpose could have been served by any one testifying that Fox Philadelphia and Twentieth Century-Fox were not parties to a split if, in fact, they had been parties to it.

Finally, we have Viking's reliance upon the so-called Schwalberg Agreement. This was Viking's Exhibit P. 8 in the trial court (R. 2393-94). In both courts below and again here Viking has contended that that exhibit is direct proof of an agreement among the respondents to injure Viking. Circuit Judge Smith at the argument in the court below put this question to Mr. Williams (Stenographic Minutes, p. 175):

> "JUDGE SMITH: Let me interrupt you just a moment. So far the thrust of your rebuttal has been di-

> rected at Paramount and the Schwalberg Agreement. Assuming all that you say to be true, and the Schwalberg Agreement apparently originated with Paramount, the philosophy of formula, whatever you want to call it, what ties Fox or Universal, assuming this Schwalberg scheme was coupled with the split arrangement illegal, what evidence ties Fox or Universal to either the split or the Schwalberg formula or both?"

Mr. Williams replied, candidly (Stenographic Minutes, p. 177):

> "MR. WILLIAMS: On Fox. I don't think there is any evidence in the record, Your Honor, to tie Fox into the Schwalberg Agreement."

The "Fox" to which Judge Smith and Mr. Williams were referring was Twentieth Century-Fox. With respect to the other Fox, Fox Philadelphia, both Mr. Fabian and Mr. Goldman, and others, testified that it had never been a party to a split. The Schwalberg agreement obviously had nothing to do with Fox Philadelphia.

The only conclusion that can be drawn from the foregoing testimony and Mr. Williams' concession is that Fox Philadelphia and Twentieth Century-Fox, in fact, were not parties to any split of product in Philadelphia and had no agreement concerning it. The conclusion of the court below that Twentieth Century-Fox pictures were "available to all interested exhibitors" (R. 2779) is fully supported by the record.

Thus it is that Fox Philadelphia and Twentieth Century-Fox are not concerned with the legal effects of the splits. That aspect of the case, therefore, is left to those respondents who were concerned with the splits.

The admitted preference of Twentieth Century-Fox for the Fox theatre as its customer and of Fox theatre for Twentieth Century-Fox as its supplier was in every sense a lawful exercise of business judgment. Indeed, it was but an exercise of the traditional right of an American trader, to select his own customer and to deal with him as he chose. Neither Fox Phila-

delphia nor Twentieth Century-Fox had anything approaching a monopoly in Philadelphia or elsewhere. Fox Philadelphia operated but one of the twelve first run theatres in downtown Philadelphia (R. 2792), as Viking itself concedes (Br. p. 5). Twentieth Century-Fox was but one of eight distributors named as defendants in this case and there were, of course, many others in the industry.

Fox Philadelphia and Twentieth Century-Fox acted independently and without concert of action with the other defendants. They had the right to deal with each other to the exclusion of any other exhibitor or distributor. This Court has considered the question of independent as opposed to concert of action on many occasions. In *Theatre Enterprises v. Paramount*, 346 U. S. 537, the question before this Court was phrased in the following language (p. 540):

> "The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express."

This question is necessarily present in all cases under the Sherman and Clayton Acts, 26 Stat. 209, 38 Stat. 731, 15 U. S. Code §§ 1 and 15. In *Bordonaro Bros. Theatres v. Paramount Pictures*, 176 F. (2d) 594 (2nd Cir. 1949), the question was phrased as follows (p. 596):

> "The central issue here, as in our recent case of Fifth and Walnut, Inc. v. Loew's Inc., 2 Cir., 176 F. 2d 587, is whether the admitted inability of plaintiffs to obtain first-run films for their theatre sprang from a conspiracy to exclude them from the first-run field or whether it was the natural result of independent business judgments as to the relative value of their exhibition facilities."

We consider here briefly the law as it relates to the right of an American trader to select his customer and to determine

how he will deal with him. Twentieth Century-Fox had the right in the exercise of its independent business judgment to license its pictures solely to the Fox theatre to the exclusion of Viking and others. If Twentieth Century-Fox had thus decided to offer its pictures only to Fox Philadelphia, Viking would have had no standing to complain. Such a decision would not have violated the anti-trust laws.* This follows directly from the principle that, in the absence of a conspiracy or monopoly, a seller may refuse to deal with a prospective purchaser for any or no reason at all. *United States* v. *Colgate & Co.*, 250 U. S. 300, stands for this historic principle. In that case this Court held (p. 307):

> "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

Colgate is directly in point on the facts established below. There is no element here relating to the re-sale price of goods sold to a dealer, or of tie-ins with other dealers, wholesale or retail, or agreements with other companies in the same or similar lines of business. There was no refusal, moreover, by Twentieth Century-Fox to deal with Viking and no attempt by Fox Philadelphia to persuade Twentieth Century-Fox not to deal with

*This discussion is based upon a supposititious set of facts to emphasize our point. We know that there was no such decision because Viking was afforded the opportunity to bid or negotiate for all Twentieth Century-Fox pictures and, in fact, was licensed over half the pictures in which it had an interest (R. 838-39).

Viking. There were no arrangements with third parties which affected their liberties to deal with Viking. Thus, *Colgate* as it was decided is conclusive on the right of these two companies, Fox Philadelphia and Twentieth Century-Fox, to deal with each other.

Decisions subsequent to *Colgate*, limiting the scope of that decision, are not pertinent because the defendants in those cases had extended their activities beyond that held lawful in *Colgate*. Thus, *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85; *Frey & Son, Inc.*, v. *Cudahy Packing Co.*, 256 U. S. 208; *Federal Trade Comm'n.* v. *Beech-Nut Packing Co.*, 257 U. S. 441; and *United States* v. *Parke Davis & Co.*, 362 U. S. 29, are not in point on the question here.

The Ninth Circuit in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prod. Co.*, 284 F. (2d) 1, reversed on other grounds, 370 U. S. 19, had this to say of *Colgate* and the principle for which it stands (p. 15):

> "The right to offer to sell or buy with perfect freedom, and to refuse to sell or buy with the same freedom, is supposedly a fundamental right sought to be protected by our competitive free enterprise system, and by the antitrust laws.
>
> "Its legality has been primarily established by what has been described as one of the ten leading cases in antitrust enforcement during its seventy year history: United States v. Colgate & Co. 1919, 250 U. S. 300, 39 S. Ct. 465, 63 L. Ed. 992. Speaking for a unanimous Court, Mr. Justice McReynolds there referred to the long recognized right of a manufacturer to exercise his independent discretion as to parties with whom he would deal. But like so many generalizations, the 'right' to exercise independent discretion cannot be taken as an absolute."

On the facts established below, however, the right was absolute. When it entered the market, Viking, to be sure, had the right to

be considered as a potential customer of Twentieth Century-Fox. It was entitled to protection from anti-trust violations. It was entitled to compete if it could. Viking was accorded those rights. Viking, on the other hand, had no vested right to any particular picture distributed by Twentieth Century-Fox or to the pictures of any particular distributor. At most, it was entitled to the protection noted. No more. That is the holding of the court below in another case. In *William Goldman Theatres* v. *Loew's, Inc.*, 150 F. (2d) 738 (3rd Cir. 1945), that court, said (p. 743):

> "Free trade between private parties is subject to the condition that a particular method of doing business must not run afoul of the federal anti-trust laws. We do not believe it our function to enter into the strife of the competitive markets to protect the unfortunate. Plaintiff, as the mere lessee of a theatre, has no right to demand defendant's products. But, plaintiff does have the right to have its business protected if there is concert of action directed at plaintiff, which results in its removal from competition."

Viking was so protected. No exhibitor could have had greater protection to compete than one who was able to secure in the market over half of what it sought, here eight of the fifteen Twentieth Century-Fox pictures in which it claimed an interest (R. 837-38).

Circuit Judge Smith at the argument in the court below summed it all up in the following question to Viking's counsel in that court (Stenographic Minutes, p. 48):

> "JUDGE SMITH: The Fox exhibitor wants only Twentieth Century-Fox distributor pictures. Is there anything wrong with it? Suppose it was an absolute exclusive franchise and they are going to take no bids from anybody and nobody bids for those pictures? What is illegal about it?"

Mr. Williams in his answer agreed that there was that independent, unilateral, right. He said (p. 48):

> "MR. WILLIAMS: If this was a unilateral determination—"

Of course, Mr. Williams is right. And there is not a suggestion in the record that Twentieth Century-Fox did not act independently in seeking Fox Philadelphia as its customer or that Fox Philadelphia did not act with equal independence in seeking Twentieth Century-Fox pictures for its theatre.

II. THE DISTRICT COURT IN NO WAY PREJUDICED PETITIONER IN THE PRESENTATION OF ITS CASE

No one could take seriously Viking's prophecy that "the decision below rests on a theory of evidence which, if not exploded by this Court, could well spell an end to private antitrust suits" (Br. p. 44) or that "the Court of Appeals has crippled the private antitrust suit as a device for the enforcement of the antitrust laws" (Br. p. 49). There has not been and will be no such result as that predicted by Viking. The reason is apparent. Anti-trust plaintiffs are quite as alert now as before June 21, 1963, when the court below rendered its decision.

In the first place, Viking claims a far greater limitation upon its evidence and proof than was imposed. Further, it took Viking ten weeks to put in its own case—now, apparently, its truncated case—on what Viking claims was a restriction upon its evidence to the 87 pictures in which it was interested.* There was a great deal more evidence than that relating solely to the 87 pictures. If there had been a conspiracy, moreover, you surely would have expected to find it somewhere in the 87 pictures. Viking was allowed to go up and down every street,

*The 87 pictures in which it was "interested", not upon pictures on which it submitted bids, as Viking erroneously states at p. 45 of its brief.

alley and by-path on each and every one of the 87 pictures in which it had any conceivable interest, however tenuous that interest might have been. Even on the pictures where other exhibitors made manifestly superior offers, Viking was given full opportunity to explore every avenue of the negotiations. Viking came up with no proof of a conspiracy respecting the 87 pictures. What value evidence relating to the other 381 could have had in proving a conspiracy among the defendants eludes us.

Viking, in its evidence, was not cabin'd, cribb'd, confined or bound in by the trial court. The evidence in that court was by no means as restricted as Viking would have this Court believe. There was before that court a stipulation showing the national film rentals of all pictures distributed by the respondents during the period of the law suit (R. 41-56). Of those pictures, the ones which Viking exhibited are listed in its own Exhibit P. 176 (R. 2644-48). The remainder obviously played in other first run theatres. That brings us to what, since the appeal below, has become known as Exhibit P. 135 (R. 2751-54).

Exhibit P. 135 dispels Viking's contentions, at least so far as Fox Philadelphia and Twentieth Century-Fox are concerned. It is entitled "*Twentieth Century Fox Films Exhibited at Fox Theatre.*" The bracketed explanation is "*This exhibit was a part of Twentieth Century Fox's response to plaintiff's request for admissions, Docket No. 56, filed January 30, 1959*" (R. 2751). That Exhibit sets out for the forty Twentieth Century-Fox pictures exhibited at the Fox theatre from July 9, 1954, through November 20, 1956, as well as eight others which played earlier, the titles of pictures; play-dates; gross [that is, box office] receipts; film rental paid; and advertising expenditures on first run in the Philadelphia area. That document was marked prior to the trial. When Viking began offering documents which had been marked as exhibits no objection was made to P. 135. The

following colloquy, however, occurred at page 7163 of the stenographic minutes:*

"Mr. Ward: Now, Exhibits 122 to 134, inclusive, we have no objection to those.

"Mr. Sawyer: 135 is now withdrawn.

"Mr. Ward: 135 is withdrawn. That brings us to—Mr. Young do you have an objection at this time?

"Mr. Young: No objection to 138. That brings us to 147, I believe."

After the arguments on the appeal in the court below, Viking filed its own supplemental appendix, now apparently Volume IX of the Record in this Court, in which it printed Exhibit P. 135 (R. 2751-54). Entirely apart from the propriety of printing for this Court and the court below a withdrawn exhibit, Exhibit P. 135, now that it is here, throws light on Viking's contention that it was unduly restricted in its proof. It shows, for example, that Fox Philadelphia bid guarantees to obtain pictures but was, and quite rightly so, required to pay the guarantees regardless of the success of the picture. CAROUSEL is a picture in point. That picture—an artistic triumph but a relative box-office failure—took in only $129,433.68 at the box office. Fox Philadelphia's guarantee of $82,500, however, was paid in full without a law suit.

Adjustments, if any, do not appear on the exhibit. But Viking makes no claim that there was an adjustment on any of the six Twentieth Century-Fox pictures in which it was interested but which were licensed to the Fox theatre or the seventh which was licensed to the Mastbaum. Viking's offer of proof on adjustments was plainly deficient. Concerning that offer, the court below said (R. 2784):

*This part of the stenographic minutes was not printed in the joint appendix below, the Record here, for the obvious reason that Exhibit P. 135 had been withdrawn.

> "The offer of proof identified the exhibitors allegedly favored but failed to indicate which of the distributors were guilty of the alleged discrimination. We are of the opinion that the offer of proof was properly rejected. The facts which the plaintiff offered to prove could have had no legal significance in the absence of additional evidence which would afford a reasonable basis of comparison between the adjustments granted the defendant exhibitors and those denied the VIKING. There is no such evidence in the record and none was offered."

And, further (R. 2784):

> "It was the policy of TWENTIETH CENTURY to deny adjustments on pictures licensed on a competitive bidding basis. This policy cannot be regarded as discriminatory."

And, concerning Viking's offers of proof in general, the Court of Appeals said (R. 2790-91):

> "We have heretofore considered each of the offers of proof and have determined that they were not of sufficient probative value to warrant the conclusions in support of which they were offered. This deficiency aside, the relevancy of the proffered evidence to the issue of conspiracy was, at best, tenuous."

Viking's offer of proof as to the number of pictures licensed on bidding did not include Fox Philadelphia for the most manifest of reasons (R. 1039). Fox Philadelphia went into the market place and licensed in competition with Viking and others more of the pictures exhibited by it on competitive bidding than did Viking. That is the only permissible inference from the offer of proof, and it happens to be the fact.

The stipulation as to national film rentals covered fifty-seven Twentieth Century-Fox pictures. Of that number,

Viking was interested in fifteen and was licensed eight. Of the others in the fifteen, Fox theatre was licensed six and Mastbaum one. Altogether, Fox Philadelphia exhibited forty of the fifty-seven Twentieth Century-Fox pictures (R. 2751-54). Mastbaum played one (R. 827-28). Randolph also played one (R. 835) and Midtown two (R. 836). Viking, of course, played eight. Thus, we know the film rentals, play-dates and terms on forty-nine of the fifty-seven Twentieth Century-Fox pictures exhibited during the relevant period and where three others were exhibited. The other five were, apparently, pictures which interested neither Viking nor Fox Philadelphia. Viking, at least, showed no interest in them and they were exhibited, if at all, in theatres other than the Fox or Viking.

Plainly, there was no significant fact concerning Fox Philadelphia and Twentieth Century-Fox or Viking and Twentieth Century-Fox which was not before or available to both courts below. None of the District Court's rulings on Viking's offers of proof, or otherwise, took anything from the jury that was not before it or available to it so far as Twentieth Century-Fox and Fox Philadelphia are concerned. There was nothing on this aspect of the case for the jury to decide.

III. HAD THE CASE BEEN SUBMITTED TO THE JURY, THE TRIAL COURT WOULD HAVE BEEN REQUIRED TO SET ASIDE A VERDICT FOR VIKING

Viking, understandably, does not advance any contention here that, in addition to conspiracy, it also proved that in fact it had suffered damage as a result of respondents' alleged unlawful conduct. And yet proof of the fact of damage is as essential to recovery as is proof of conspiracy. Reasonable estimates are not permissible if a plaintiff has not proved that, in actual fact, he suffered damage to his property or business.

Inadvertance does not cause Viking to stand silent in this Court on the question of damage. In directing a verdict for

the respondents here, Judge Lord held that Viking not only had failed to establish liability, that is, a conspiracy, but also that Viking had failed to establish "the fact that plaintiff was damaged or injured as a result of any such combination or conspiracy" (R. 2351). Absence of either of those essential showings was fatal to Viking's case. A showing of actual damage is the requirement of Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, which provides for recovery only to one who "shall be injured in his business or property".

The courts have confirmed that requirement in all cases where the question has been considered. The question was first before this Court in *Keogh* v. *C. N. & W. Ry. Co.*, 260 U. S. 156. This Court there said (pp. 164-65):

> "Finally, not only does the injury complained of rest on hypothesis (compare *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 222-224); but the damages alleged are purely speculative. Under § 7 of the Anti-Trust Act [now Section 4 of the Clayton Act], as under § 8 of the Act to Regulate Commerce, *Pennsylvania R. R. Co.*, v. *International Coal Mining Co.*, 230 U. S. 184 recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. To make proof of such facts would be impossible in the case before us."

As supporting the foregoing, the court cited *Central Coal & Coke Co.* v. *Hartmann*, 111 Fed. 96 (8th Cir. 1901); *Locker* v. *American Tobacco Co.*, 218 Fed. 447 (2nd Cir. 1914); and *American Sea Green Slate Co.* v. *Halloran*, 229 Fed. 77 (2nd Cir. 1915).

In *Central Coal & Coke Co.* v. *Hartmann* the court said (p. 98):

> "Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damage which will

sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages."

In *Locker* v. *American Tobacco Co.* the court said (p. 448):

> "It matters not that certain of the defendants have violated the provisions of the Sherman Act unless it be proved that such acts have injured the plaintiffs and caused them damages which can be recovered in an action at law."

And in *American Sea Green Slate Co.* v. *Halloran* the court said (p. 79):

> "To recover under the seventh section [of the Sherman Act] plaintiffs must show that, as a result of defendants' acts, actual damages were sustained—damages in some amount which is susceptible of expression in figures. These damages must be proved by facts from which their existence is logically and legally inferable—not be conjectures, or estimates. They must not be speculative, remote, or uncertain."

The question was again before this Court in *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555. In that case the court said (p. 562):

> "Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon

> mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount."

Eastman Co. v. *Southern Photo Co.*, 273 U. S. 359, and *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, are to the same effect. In each of those cases plaintiff had established the fact of damage. Plaintiff, after establishing that fact, was then allowed to submit a reasonable and credible estimate of the amount of damage.

This rule of law, that a plaintiff in a private anti-trust treble damages action must first establish the fact of damage before he can recover, has been the subject matter of recent decisions by the Courts of Appeal: In *Flintkote Company* v. *Lysfjord*, 246 F. (2d) 368 (9th Cir. 1957), cert. den. 355 U. S. 835, the court stated the rule as follows (p. 392):

> "We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue."

And further (p. 392):

> "The cases have drawn a distinction between the quantum of proof necessary to show the *fact* as distin-

> guished from the *amount* of damage; the burden as to the former is the more stringent one. In other words, the *fact* of injury must first be shown before the jury is allowed to estimate the *amount* of damage."

The court then quoted the passage set out above from the *Story Parchment* case.

The rule was again stated in a few words by the Ninth Circuit in *E. V. Prentice Mach. Co.* v. *Associated Plywood Mills*, 252 F. (2d) 473, 477, cert. den. 356 U. S. 951, as follows (p. 477):

> "Regarding the quantum of proof required to establish the fact of damage, the rule is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between the defendant's wrongful act and some loss of anticipated revenue."

Accord: *Kobe* v. *Dempsey Pump Co.*, 198 F. (2d) 416 (10th Cir. 1952), *cert. den.* 344 U. S. 837, and *Stearns* v. *Tinker & Rasor*, 252 F. (2d) 589 (9th Cir. 1957).

No plaintiff in any case was ever on more stringent notice that it was required to prove the fact of damage before it could succeed than was Viking. No better marked warning flags were ever put out for a plaintiff than those put out here. Both counsel and the Court warned Viking that it was required to prove the fact of damage before it could hope to succeed. Even if Viking had been able to prove that there had been a conspiracy of some sort to injure it, Viking ignored all warnings that it was also required to prove the fact of damage. Viking proceeded on its own way in the face of the sternest strictures of the law that, as plaintiff, it was required to show that, in fact, it was injured before the Court or jury could consider the amount of damage, however speculative such damage might have been. Viking contented itself with the averaged-out

world of Schedule A (R. 2065-68.)* A less realistic approach to the question of damages could not be imagined than that which Viking proposed in the trial court.

The basic fault of Schedule A is that it proves nothing. When the schedule was first offered on the tenth day of the trial, Viking represented to the court in the plainest of words that, while he wished to defer the question, Schedule A would be offered to prove that "if the Viking had obtained product of comparable quality to the other theatres it could have earned the same comparable grosses. That is inherently bound up with this method of doing it." (R. 309). And further, in answer to the court's questions with respect to Schedule A, Viking asserted (R. 309-10):

> "I propose to go into this schedule now and I propose to ask him one question, which the defendants will rebut, but it is a question which is the necessary question to have him asked and to be on the record, and that is, if the Viking had obtained product comparable to that obtained by the defendants would it have been able to gross as well as the defendant theatres and would they have been able to average these kind of grosses."

Mr. Wren was never—not once—asked that question, although Viking's argument on Schedule A at that time related to Viking's grossing potential. We were with that contention for a while. As the trial progressed, however, Viking shifted its position completely. When the admissibility of Schedule A was finally argued, Viking abandoned any claim that Schedule A related to Viking's grossing potential, and it asserted (R. 1548):

*Schedule A shows the gross receipts less film rental of the seven theatres of the respondent exhibitors. The so-called "net" is totaled and then divided by seven. From that "average" Viking has subtracted its so-called "net". The difference is supposed to be the amount of Viking's damage. This is indeed Cloud-cuckoo-land in the law of damages.

> "Now, here again, Your Honor, we are not involved in an argument about grossing potential. The gist of Schedule A is not grossing potential, nor does grossing potential enter into Schedule A. The essence of Schedule A is a difference between film rental as compared to gross. We have constantly this argument about whether or not the Viking can gross what other theatres can gross. This is inherent whenever this system is used, and theatres are naturally of different sizes."

On the 29th day of the trial, June 26, 1961, full argument was had on the admissibility of Schedule A (R. 1544-55). In opposition, the respondents here limited their argument to the contention that Viking was required to and had not offered any proof that in fact it had been damaged (R. 1546-48). On the then state of the record Viking had not offered a word of testimony or any other evidence as to the fact of damage—not a word. Judge Lord noted at the outset of that short argument that Viking was required to prove the fact of damage and that Schedule A was admissible, if at all, only to show Viking's claim as to the amount of damages. In a colloquy between the court and counsel (R. 1547-48) the court asked how Viking could prove damage, assuming it had actually sustained injury in its operation of the theatre. It was respectfully noted that that was a question which more properly should be answered by Viking. Judge Lord agreed. He said (R. 1548):

> "THE COURT: You let me have the answer to that question, then, Mr. Sawyer."

Following Viking's argument on the admissibility of Schedule A, Judge Lord was again explicit in ruling that Viking would be required to prove the fact of damage and that Schedule A was not proof of that fact. Judge Lord directed Viking, if it felt otherwise, to brief the question (R. 1550). Viking did not brief that question. Judge Lord had this further comment with respect to the fact of damage (R. 1550):

> "Well, why do the cases then say that before you can prove damages, that is monetary damages, the amount of actual damage in dollars, you have to prove the fact of damage.
>
> "To me that is clear, that you can't prove the fact of damage by the dollars in damages. However, we don't have to decide that at the moment. But it is important, so, therefore, I would like to have a brief on that point."

Judge Lord subsequently held that Schedule A was admissible. In admitting Schedule A, however, Judge Lord again issued this clear warning to Viking (R. 1653):

> "I interpolate here, Mr. Sawyer, in that I have indicated to you that I think—and I quoted here—that there is a difference between the fact of damage and the amount of damage, and my conclusion now on many of the cases that appeared in Mr. Young's brief is that the fact of damage means whether the conspiracy is present, whether the plaintiff was damaged by reason of the wrongful act, and that is different and has to be established before the amount of damage is competent."

This, it seems to us, was also a red flag of the plainest sort. After Schedule A was held admissible as Viking's theory as to the amount of damage, Viking was again on notice that it was required to submit proof of the fact of damage. Up to that time there had not been a word from Wren or Sley regarding damages. Here were the two men who would have had knowledge of the fact that Viking had been damaged, if indeed it had been damaged, and the amount of the damage. But there had not been up to that time, we repeat, not one word from either Sley or Wren that Viking had been damaged, that it should have made so many dollars and so on.

What happened when Wren came back for his testimony on damages? Wren's entire testimony on direct by Viking's own counsel—and this is quite the most amazing aspect of the case—covered less than four pages, including Schedule A (R. 2065-

68). Wren simply testified to the arithmetical accuracy of the figures. There is not even an opinion, however worthless it might have been, that Viking would have earned so much or so much more or that it had been injured in so many dollars. Wren said that the amount of film rental a theatre pays determines the financial success of a theatre. What is that statement supposed to prove? If that is proof of damages, then the law of damages has been reduced to foolishness.

Schedule A concededly is Viking's theory of damages but it surely is not proof of the fact of damage. The cross-examination of Wren revealed all the defects in Schedule A. Not only are all the pictures of the seven first-run theatres operated by the exhibitor respondents included, but pictures of non-defendant distributors and most if not all the pictures in which Viking had no conceivable interest are included. Quite importantly, also, four theatres Viking has listed as first run theatres at page 5 of its brief, the Trans-Lux, Arcadia, World and Studio are not included. All of the forty pictures which played the Fox theatre are included although Viking sought no Twentieth Century-Fox pictures exhibited at the Fox before September 23, 1955, when it submitted for the first time an offer on a Twentieth Century-Fox picture, a bid on THE TALL MEN (R. 1110). How could Fox Philadelphia or Twentieth Century-Fox have caused damage to Viking on pictures which Viking neither sought nor wanted? No man can be injured by a deprivation of that which he did not seek.

Assuming, then, that liability had been established, there was no proof whatever of the fact and no credible evidence of the amount of damage. Schedule A was a sham and Viking, as seen by its change of theory on the grossing potential of its theatre in offering Schedule A, was well aware that it was a sham. Schedule A was a cipher. If the trial court had submitted the case to the jury and if the jury had returned a money verdict for Viking—a most unlikely event—the court

would have been required to set aside the verdict and enter judgment for the defendants.

There was no error in directing a verdict at the close of plaintiff's case.

Conclusion

Fox Philadelphia and Twentieth Century-Fox were not parties to the splits of product in Philadelphia. They had the absolute right to trade with each other, absent monopoly or conspiracy, to the exclusion of all others. Viking, however, was afforded a fair opportunity by Twentieth Century-Fox to compete with Fox Philadelphia. Viking's evidence with respect to these respondents went far beyond the fifteen Twentieth Century-Fox pictures in which petitioner was interested.

There was no conspiracy among any of the respondents to injure Viking. Had there been, however, Viking's failure to prove either the fact of damage or to offer credible evidence of the amount of damage entitled respondents to a directed verdict.

We respectfully submit that the judgment of the court below should be affirmed.

Respectfully submitted,

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February 28, 1964